

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 14, 2006

**ASHAD R.A. MUHAMMAD ALI, a/k/a LOUIS WEBB v. STATE OF
TENNESSEE**

**Direct Appeal from the Circuit Court for Lincoln County
No. S0200101 Robert Crigler, Judge**

No. M2005-01137-CCA-R3-PC -Filed June 2, 2006

The defendant, Ashad R.A. Muhammad Ali, a/k/a Louis Webb, appeals pro se the dismissal of his petition for post-conviction DNA analysis. The defendant presents two issues: (1) whether the post-conviction court properly dismissed the petition, and (2) whether the post-conviction court erred in denying relief or sanctions for the failure of the State to preserve all testable evidence. We conclude that the petition was properly dismissed and that no relief or sanctions for failure to preserve all testable evidence should be afforded the defendant. We affirm the post-conviction court's dismissal of the defendant's petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Ashad R.A. Muhhammad Ali, a/k/a/ Louis Webb, Tiptonville, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; William Michael McCown, District Attorney General; and Ann L. Filer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The defendant pled guilty to aggravated rape, armed robbery, and first degree burglary in 1985. He received a total effective sentence of forty years to be served in the Department of Correction. In June 2002, the defendant filed a petition for post-conviction relief seeking DNA analysis of evidence obtained during the investigation of the aggravated rape charge. The post-conviction court summarily dismissed the petition based on the State's declaration that no such testable evidence existed. The defendant appealed to this court on two issues: 1) whether the trial

court properly dismissed the petition, and 2) whether the post-conviction judge erred by not recusing himself based on his involvement with the prosecution of the defendant during the original conviction. This court ordered a remand to the post-conviction court on the issue of whether the trial judge should have recused himself. On remand, the original post-conviction judge did recuse himself for further proceedings, and the present post-conviction judge began the proceedings anew.

On remand, the defendant was appointed counsel and requested discovery of all materials and all personnel involved with the original investigation. The State again declared that there was no evidence available for testing. The defendant's counsel moved the court for a non-suit of the petition so the defendant would not be precluded from obtaining relief in the event that testable evidence became available. The non-suit was granted by the court. The defendant, then pro se, moved to have the non-suit set aside, arguing that he did not understand the operation of a non-suit as a dismissal. The defendant also moved to have his appointed counsel dismissed so he could proceed on his own. The trial court dismissed the motion to set aside the non-suit and held that the defendant was not precluded from refiling his DNA petition. The record before us shows the defendant pro se and his petition for DNA analysis dismissed.

Analysis

The defendant's counsel sought an order from the post-conviction court that an independent investigator be appointed to search the records of the Tennessee Bureau of Investigation to determine whether any testable evidence existed. Said motion was dismissed. On the day scheduled for hearing the petition for DNA analysis, the defendant's counsel advised the defendant to take a non-suit on the petition so that he could file at a later date if evidence suitable for testing was found. The defendant, pro se, filed a motion to set aside the non-suit, claiming he had no knowledge that a non-suit acted as a dismissal of his petition. He further requested that appointed counsel be relieved and that he be allowed to proceed pro se. After a hearing, the post-conviction court denied the motion to set aside the voluntary non-suit and granted the defendant permission to proceed pro se. The pro se defendant has appealed to this court claiming that the post-conviction court erred in failing to set aside the voluntary non-suit and seeking sanctions against the state for failing to preserve evidence.

The Post- Conviction DNA Analysis Act of 2001 encompasses only DNA analysis and the procedural requirements for obtaining analysis results. As a necessary component, there must be evidence which is available for DNA testing. This record reveals that the State answered and stated in open court that they were unaware of any existing testable evidence. The defendant's appointed counsel acknowledged in open court that the defendant was unable to show that any testable evidence existed. The defendant, having failed to show any available evidence for testing existed, has failed to satisfy any of the four qualifying criteria under Tennessee Code Annotated section 40-30-304, and the post-conviction court should have dismissed the petition. We further conclude that a non-suit is not contemplated or allowed. In Kennerly v. State, No. M2003-00489-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 1001, at *8 (Tenn. Crim. App. Nov. 5, 2004, at Nashville), this court concluded that, based upon the statutory provisions of Tennessee Code Annotated section 40-30-312, a petitioner may not voluntarily dismiss his petition after the biological evidence has been submitted

for forensic DNA analysis. Id. at *8. In keeping with the rationale in Kennerly, we conclude that a non-suit is not possible in the instant case. Regardless of the procedural problems presented by the alleged non-suit, we restate that, upon this record, the State has no testable evidence and that the defendant was unable to produce any proof that testable evidence exists.

On appeal, the defendant argues that the trial court erred in dismissing his petition for DNA analysis because he did not knowingly non-suit the action. The defendant, upon advice of counsel, entered a non-suit of his action for DNA analysis. Trial counsel advised the defendant to take a voluntary non-suit of his petition because his efforts at discovery failed to produce any type of testable evidence. Counsel advised the non-suit in an effort to give the defendant more time to discover whether any evidence could be located. Counsel opined that had defendant proceeded with a hearing on the scheduled trial date, the petition would have been dismissed for lack of testable evidence and the defendant would have forever lost the DNA analysis ground of appeal. See T.C.A. § 40-30-304(2) (2003).

The defendant also argues that he is entitled to relief because evidence containing DNA in his case might have been lost or destroyed. The Post-Conviction DNA statute provides for sanctions when evidence is destroyed after a petition for DNA analysis has been filed:

When the petition is not summarily dismissed, the court shall order that all evidence in the possession of the prosecution, law enforcement, laboratory, or the court that could be subjected to DNA analysis must be preserved during the pendency of the proceeding. The intentional destruction of evidence after such an order may result in appropriate sanctions, including criminal contempt for a knowing violation.

T.C.A. § 40-30-309 (2005). However, the statute does not provide for relief if evidence is lost or destroyed prior to the filing of the post-conviction DNA analysis petition. See Johnson v. State, No. M2002-03033-CCA-R3-PC, 2004 WL 101629 (Tenn. Crim. App. Jan 16, 2004, at Nashville), app. denied (Tenn. June 14, 2004). In the instant case, the defendant pled guilty in 1985 and was sentenced to an effective forty-year sentence in the Department of Correction. He brought the underlying petition for DNA analysis in June 2002, seventeen years after the conclusion of the proceedings. We concluded that the court did not err in dismissing the petition based on the voluntary non-suit of the defendant. Counsel for the defendant attempted by all reasonable means to obtain any evidence that might exist for DNA testing. It is likely that no such evidence exists because it had been destroyed several years prior to the defendant's petition for DNA analysis. The defendant has failed to show any bad faith on the part of the State in destroying the evidence. It places an unreasonable burden on the State to forever preserve each article of evidence collected in every investigation on the chance that it may later be called upon for further analysis.

Conclusion

We affirm the trial court's dismissal of the petition for DNA analysis and conclude that the defendant is not entitled to any relief because his efforts at discovery were unsuccessful.

JOHN EVERETT WILLIAMS, JUDGE